Cite as: R. v. Jackson, 1990 NSCA 99

S.C.C. No. 02329

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Jones and Freeman, JJ.A.

BETWEEN:

ROBERT DOUGLAS EDWARD JACKSON Appellant	The appellant appeared in person Adrian C. Reid for the respondent
- and -	Appeal Heard: December 11, 1990
HER MAJESTY THE QUEEN Respondent	Judgment Delivered: December 20, 1990

THE COURT: Appeal dismissed per reasons for judgment of Jones, J.A.; Clarke, C.J.N.S. and Freeman, J.A. concurring

JONES, J.A.:

This is an appeal by Robert Jackson against his conviction on a charge that he:

> "At or near Lawrencetown in the County of Annapolis, Nova Scotia, on or about the 21st day of March, 1990 did unlawfully break and enter a certain place to wit: Lawrencetown Motors situate at Lawrencetown in the County of Annapolis and did thereby commit the indictable offence of theft contrary to Section 348(1)(b) of the **Criminal Code of Canada.**

During the night of March 20 and 21, 1990 there was a break and entry into the premises of Lawrencetown Motors, a service station at Lawrencetown, Annapolis County. Entry was gained through a window which was forced open. Five or six batteries, ten or more tires, tools and equipment were stolen. The thieves exited through a door in the paint room which was left open. The stolen goods were valued at $8,000.00. Vehicles were parked by the garage. A chemical toilet, a radio and speakers were stolen from a van. A car had been recently painted in the paint shop and paint dust covered the floor. The floor was covered with foot prints. The prints were also found on paper which was lying on the floor.

On March 22, 1990, at 11:30 p.m. police officers checked a van parked on a dead end street in Wolfville. The appellant was the operator. Three

other men and a woman were present in the vehicle with a dog. The individuals had been drinking. The van contained a number of articles which were positively identified as stolen in the break at Lawrencetown Motors. Some of the tools were marked with initials. The portable toilet and the radio speakers were in the van. There was also a section of air hose in the van which had been cut. At the trial it was established that the section matched part of the air hose found at the station.

The footwear of the men in the van was seized. An impression found on the paper which was on the paint floor shop matched the size and pattern of a running shoe worn by the appellant.

Two other impressions were similar to the footwear worn by two of the other men in the van.

The van occupied by the four men was a stolen vehicle. On March 22, 1990, the appellant took the van to his place of employment at a carpet cleaning establishment. His employer stated the van was empty at that time. When they were out on the job the appellant saw the dog on the street and put it in the van. He said he was going to take it to the pound.

The appellant was originally charged with possesion of the van. Further investigation led to

the charge of break and entry. He was tried on the break and entry charge before Judge Nichols in the Provincial Court. He testified on the trial. He was twenty-five years of age and has a criminal record. He was living in Dartmouth with his common-law wife. The appellant testified that he stole the van around noon on March 22 from a parking lot near his apartment building. He first observed the van two or three days before the 22nd. The first time he saw the van the keys were in it. He apparently observed the van on several occasions and the keys were in it although it had been moved on the parking lot. On Thursday, Mr. Jackson succumbed to the temptation and stole the vehicle. The stolen goods recovered by the police were in the van. He took the van to work but before doing so he removed the goods from the van. He put them back in the van later in the afternoon. The dog was a husky which he acknowledged taking from the street. He went to a party in Dartmouth and took the dog with him in the van. He met his friends at the party and they proceeded to the beer store. They were all drinking heavily and decided to go for a drive. They had no particular destination and wound up in Wolfville where they encountered the police. The appellant denied being involved in the break and entry at Lawrencetown. On the day he stole the van

he removed the front license plate. He intended to put his own plates from another car on the van. The plate was recovered from his apartment. He said the van was worth twelve or thirteen thousand dollars.

Rebecca Clark lives with the appellant. She recalled the police coming to the apartment and recovering the plate. She had picked a plate up on the street a couple of days before the police arrived. She thought the appellant was home on the night of the break and entry. She was not aware that Mr. Jackson had the van.

The appellant who appeared in person on the appeal contended that he was not involved in the break and entry.

Judge Nichols reviewed the evidence and convicted the appellant. The appellant admitted that he stole the van. Within forty-eight hours the appellant was found in possession of the van which contained stolen goods from the break and entry. The doctrine of recent possession was clearly applicable. Turning to the evidence of the accused the trial judge stated:

> "The explanation, the Court must determine based on the criminal, of the law of doctrine of recent possession, the Court must determine whether or not the explanation given by Mr. Jackson is credible under the circumstances, whether or not the, all the explanation, one is, which the Court sitting

as a jury facing this actual situation might presume to be true.

It is, as pointed out by Mr. Ionson, for the defence, if it's the explanation is one that could reasonably be true, then the Defendant is entitled to the benefit of the doubt. We are too, .and whether or not it might reasonably be true.

Well, the Court is faced with so many similarities here and I'm, I find the explanation given by Mr. Jackson is incredible. It certainly is not capable of being believed. The fact that he stole the truck, that he went in this particular area, the fact that the piece of hose cl-, is clearly matched up according to Corporal McCourt clearly indicates that this particular truck either driven by Mr. Jackson or someone else, was in the particular area of the garage. The fact that the shoes are similar in design and type as shown in photograph 7 as those worn on the feet of Mr. Jackson clearly established someone of his size or shape as wearing that size footwear were in the particular area of the Lawrencetown Motors in the paint shop.

The evidence would surely indicate that Gay and Hewitt and Burke from the print of designs had similar type of footwear were in the area where these heavy tools and batteries and tires would require one, more than one person to assist in the removal from the area. The fact that the tools were found in the van explained portion, possession of the tools in the back of the truck clearly tied the truck, the van, stolen van with tools taken from Lawrencetown Motors in Annapolis County, Nova Scotia. The toilet, the portable toilet which came from the car which was broken into on the lot of Lawrencetown Motors indicates, or similar to it, would indicate that that van was in the particular area of Lawrencetown Motors in the, short, shortly thereafter the day that the Lawrencetown Motors was broken into. The possession of the radio parts, the speakers which are, as indicated by the evidence were purchased by Mr. the late Mr. Amberman for the installation in his

> truck were in the van which was to be fixed up by Mr. Whitman and the, Mr., the late Mr. Amberman for his use and they're found in the back of the van.
>
> On the evidence before the Court, I'm satisfied that there is a clear indication that the van that was driven by Mr. Jackson was involved in the break and enter and I'm making a finding of guilt in relation to the charge of break and enter at the Lawrencetown Motors, Annapolis County, Nova Scotia."

In **Kowlyk v. The Queen** 43 C.C.C. (3d) 1989 McIntyre, J. in delivering the decision of the majority of the Supreme Court of Canada stated at p. 12:

> "In summary, then, it is my view, based on the cases, both English and Canadian, which I have referred to, that what has been called the doctrine of recent possession may be succinctly stated in the following terms. Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must -draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

I think it is clear from the decision of the trial judge that he did not accept that the explanation might reasonably be true. That involved an assessment of the evidence including the reliability

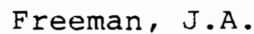
of the appellant.

The explanation that the stolen vehicle was parked in the vicinity of the appellant's residence with the keys in the ignition for two or three days, coupled with the possession of the stolen goods including the dog, and the similarity of the footprints at the scene would lead one to conclude that the explanation could not reasonably be true. I see no error on the part of the trial judge in assessing the evidence and I would therefore dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Freeman, J.A. 

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CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF ANNAPOLIS

IN THE PROVINCIAL COUART

HER MAJESTY THE QUEEN

-v-

ROBERT JACKSON

ANNAPOLIS ROYAL, Nova Scotia

May 16, 1990

His Honour Judge John R Nichols

CHARGE: At or near Lawrencetown in the County of Annapolis, Nova Scotia, on or about the 21st day of March, 1990, did unlawfully break and enter a certain place, to wit: Lawrencetown Motors, situate at Lawrencetown in the County of Annapolis, and did commit therein the indictable offence of theft, contrary to 348(1)(b).

David E. Acker, Esquire, for the Prosecution

Andrew Ionson, Esquire, for the Defence

D E C I S I O N